Editor's note: Reconsideration denied by Order dated Feb. 4, 1993

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 91-448 Decided March 11, 1992

Appeal from a decision of the Area Manager, Grand Resource Area, Utah, Bureau of Land Management, approving a notice of intent to conduct oil and gas geophysical exploration based on the finding that no significant environmental impacts would result from the exploration. U-922, EA UT-68-91-063.

Set aside and remanded.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Generally

   A determination that approval of a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging the determination must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Mere differences of opinion provide no basis for reversal. A BLM decision approving a proposal to conduct seismic oil and gas geophysical exploration will be set aside where the EA upon which the decision was based failed to consider the no-action alternative and inadequately analyzed the effects of the proposed activity on wildlife in the project area, and BLM failed to provide a public comment period on the EA.

APPEARANCES: Scott Groene, Esq., Southern Utah Wilderness Alliance, Moab, Utah, for appellant; Robert E. Lowe, Geophysical Company, Houston, Texas, for Western Geophysical Company; David K. Grayson, Esq., Office of the Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Southern Utah Wilderness Alliance (SUWA) has appealed from a June 6, 1991, decision of the Area Manager, Gra Bureau of Land Management (BLM), approving proposed geophysical oil and gas exploration by Western Geophys Geophysical) in Grand County, Utah. The Area Manager reached his decision after reviewing the environmental assessme project (EA UT-68-91-063), and determining that the proposed exploration activities with the mitigation measures outlined i any significant impacts on the human environment and conformed to the approved Resource Management Plan (RMP) for th

In May 1991 Western Geophysical filed a notice of intent (NOI) to conduct geophysical oil and gas exploration 7, 8, 9, 10, 11, 16, and 21, T. 26 S., R. 19 E., secs. 29, 32, 33, and 34, T. 25 S., R. 19 E., and sec. 12, T. 26 S., R. 18 E., Sa County, Utah. This area, known as Big Flat, lies north and west of the Knoll Prospect and west of Moab, Utah. Western envisioned seismograph operations utilizing vibroseis along four lines totaling approximately 15 miles.

Western Geophysical described the project as consisting of four primary phases:

> 1) A survey crew will survey the line. Temporary, wire pin-flags will be placed in the ground at 82.5 Access trails, roads, gates and the like will be temporarily marked with flagging. Minimal brushing with chain tools of tree limbs will take place where necessary. 2) Geophones and cables will be temporarily lain on the gro vibrator trucks will proceed down line. These trucks will center their vibratory sweeps at 330 feet intervals, w lowering its 3 ft. x 7 ft. pad, in unison, 12 times per interval. Upon lowering and raising their pads, the trucks a feet to lower the pads again, thus lowering and advancing 12 times per 330 feet interval. In the event that an area be traversed or shook upon is encountered, vibratory intervals will be "stacked" to compensate. Vibrator trucks v close to line as possible, but if obstacles are present it may become necessary to curve or weave a short distance 4) Pin-flags, geophones, flagging, and cables will be removed from the ground.

Western Geophysical planned to begin operations in May 1991 and estimated that the activities would take about 10 days

On May 13, 1991, citing 43 CFR 3151, BLM authorized Western Geophysical to proceed with the survey and cult with the project.

On May 22, 1991, BLM received a letter from SUWA expressing SUWA's general concern about Western exploration. SUWA stated that the exploration activities would occur in an area included in Utah Congressman Wayne Ow and suggested that the effects of the activities on the environment could be significant. SUWA requested that BLM allow a on the EA prepared for the project and urged that BLM give serious consideration to the no-action alternative, other alternat impacts of all oil and gas ventures in the area.

On June 6, 1991, in order to satisfy the procedural requirements of section 102(2)(C) of the National Environm (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1988), BLM prepared an EA for Western Geophysical's contemplated geophys (EA UT-68-91-063). BLM determined that the proposed action, the purpose of which was to gather new seismic informatio hydrocarbon area, conformed to the July 1985 RMP for the Grand Resource Area and had been analyzed earlier in the Decemb Area Environmental Impact Statement (EIS) and in EA UT-060-89-025. BLM described the proposed action and two altern drill and shot hole method and the helicopter and portable drill method, and examined their effects on the environment. the no-action alternative.

Before addressing the specific environmental impacts of the proposed action and alternatives, BLM indicated th the contemplated exploration had been designated in the RMP as category one for oil and gas, i.e., open to oil and gas activitie tions, and designated as open for off-road vehicle use. BLM also noted that the area was crisscrossed by jeep trails, 4-wh seismic lines, and contained no sensitive areas identified as requiring protection. The EA then examined, with varying degree the environmental effects of the proposed action and alternatives on vegetation and soils, recreation, wildlife (the Desert Bigh resources, and addressed cumulative impacts. BLM also analyzed mitigation measures and residual impacts. BLM did not ci comment.

In his June 6, 1991, decision the Grand Resource Area Manager approved Western Geophysical's proposed activities subject to all of the mitigation measures identified for the proposed action in the EA, noting that the mitigation meas as Conditions of Approval to Western Geophysical's NOI. He based his decision on his review

of the EA which he determined had satisfactorily considered the potential impacts of the proposed action and alternatives.

> Although alternatives have been identified, the proposed action is consistent with the existing Grand Resource Area
> Plan. This area has been designated as open to off-road vehicle use, the proposed action would not exceed the allo
> Resource Management] contrast change provisions, and the proponent has agreed to avoid surveyed cultural si
> [Geophysical] would also be required to "stack" their vibroseis to stay at a minimum quarter mile away from the c
> reduce possible impacts to Big Horn Sheep. The potential loss of blackbrush, noted as an impact to existing ve
> have a beneficial impact to the plant community. Reducing the density of a climax species and allowing for re
> of an earlier successional plant community may provide for greater species diversity and available herbaceous f

The Area Manager found that the proposed action with the designated mitigation measures would not have any s
human environment and that preparation of an EIS for the project was not required. He then stated his decision to implem
the identified mitigation measures. This appeal followed. 1/

On appeal SUWA challenges the sufficiency of the EA and argues that BLM's approval of the seismic geophysi
violates Federal law. Specifically, SUWA contends that BLM failed to consider the no-action alternative in violation of bot
use mandates of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701, 1702 (1988); BLM app
meeting the FLPMA inventory and planning requirements found at 43 U.S.C. §§ 1711, 1712 (1988); BLM inadequately co
impacts of the action in violation of NEPA and its implementing regulations; and BLM did not use high-quality scientific
required by NEPA. SUWA further asserts that, contrary to the mandates of 43 CFR 3150, BLM

1/ By order dated Oct. 18, 1991, the Board denied Western Geophysical's petition for expedited review. On Nov. 27, 199
Hearings and Appeals, assumed limited jurisdiction over the appeal, pursuant to 43 CFR 4.5(b), to act on requests that the
be placed in full force and effect pursuant to 43 CFR 4.21(a) by lifting the automatic stay normally imposed by that regulation
1991, the Director placed the decision into full force and effect, returned jurisdiction over the appeal to the Board, and direct
consideration of the appeal. This case became ripe for review on Feb. 7, 1992, when BLM filed the final document necessar

authorized Western Geophysical to perform noncasual geophysical activities prior to approval of the NOI, and that BLM's re comment period for the proposal violated NEPA and its implementing regulations. SUWA has also submitted a July 22, 19 Department of Natural Resources, Division of Wildlife Resources (DWR), to BLM in which DWR criticizes the EA prepar sparse analysis of the action's impacts on the diverse wildlife inhabitingthe project area, including ground nesting raptors an failure to seek DWR's comments on the EA before approving the project.

[1] This Board has held numerous times that a determination that approval of a proposed action will not have a s quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental p all relevant areas of environmental concern have been identified, and the final determination that no significant impacts will oc of the environmental analysis. See, e.g., Southern Utah Wilderness Alliance, 122 IBLA 6, 12 (1991); G. Jon & Katherine M 297 (1990); Hoosier Environmental Council, 109 IBLA 160, 172-73 (1989); Glacier-Two Medicine Alliance, 88 IBLA Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174 (1984). A party challenging the determination must show that it error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of ma proposed action. Hoosier Environmental Council, supra at 173; United States v. Husman, 81 IBLA 271, 273-74 (1984). The is on the challenging party. G. Jon & Katherine M. Roush, supra at 298; In re Blackeye Timber Sale, 98 IBLA 108, 110 (of opinion provide no basis for reversal. Id.; Glacier-Two Medicine Alliance, supra at 144. See Cady v. Morton, 527 F.2d SUWA has alleged that BLM's approval of Western Geophysical's proposal both violates the procedural requirements of N inadequate EA, which fails to consider relevant environmental issues and concerns.

SUWA first argues that BLM's failure to consider the no-action alternative fatally flaws the decisionmaking proc a brief discussion of alternatives as mandated by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1988). See 40 CFR 15 See also Oregon Natural Resources Council, 115 IBLA 179, 186 (1990); In re Long Missouri Timber Sale, 106 IBLA 83, 87 (of NEPA requires, independent of the necessity to file a formal EIS, that every Federal agency "study, develop, and describe to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of availab § 4332(2)(E) (1988). The requirement that appropriate alternatives be studied applies to the preparation of an EA eve be warranted. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (198 Resource Council, 120 IBLA 47, 55 (1991); State of Wyoming Game & Fish Commission, 91 IBLA 364, 369 (1986). Amon must

be considered pursuant to this mandate is the no-action alternative. Bob Marshall Alliance v. Hodel, 852 F.2d at 1228.

The EA prepared for Western Geophysical's proposed geophysical exploration contains no mention of the no memorandum dated August 21, 1991, from the Area Manager to the Moab District Manager, BLM, prepared in response Area Manager attempts to justify this failure:

> BLM is required to consider a range of reasonable alternatives that may serve to reduce possible impacts. In what possible purpose would the "No Action" alternative serve? If there is no action, there is no impact resul proposal, no further discussion is needed, but is this a reasonable alternative? It serves no purpose in terms of ass manager always reserves the digression [sic] to disapprove the proposal based on the level of impacts that may l [sic] on the environment as discussed in the EA. This is referenced in the rationale for his decision. Therefore, the alternative is always a consideration. Merely putting it in the text serves no purpose in this situation. [Emphasi

(Memorandum at unnumbered page 2, #4). Under this reasoning, BLM would never have to explicitly discuss the no-act We find this rationale untenable.

This Board has noted that NEPA is essentially procedural, rather than substantive. See, e.g., Hoosier Environmen State of Wyoming Game & Fish Commission, supra at 367. Nevertheless, because the purpose of the statute is to "insu well-considered decision," Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978), the procedural nat

> does not lessen the obligations it imposes to develop a record which fully discloses the rationale and basis for adequately explores the reasonably foreseeable impacts, and fairly analyzes alternatives to the proposed activity opposite is true. Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent u considering activities which may impact on the environment to assiduously fulfill the obligations imposed by N

State of Wyoming Game & Fish Commission, supra.

"Informed and meaningful consideration of alternatives - including the no action alternative - is * * * an integ Marshall Alliance v. Hodel, 852 F.2d at 1228. BLM's explanation for the lack of discussion of the no-action alternative in cavalier attitude toward its statutory obligation to study available alternatives, including the no-action alternative, and we f

address the no-action alternative in its EA requires us to set aside the decision. See Powder River Basin Resource Council

SUWA argues that the EA is inadequate because BLM failed to consider the cumulative impacts of this proposal comb the area including the trails created by past off-road vehicle use and with reasonably foreseeable future actions such as recre created by the exploration activities. BLM is required to consider the potential cumulative impacts of a planned action present, and reasonably foreseeable future actions. See 40 CFR 1508.7 and 1508.27(b)(7); G. Jon & Katherine M. Roush, sup therein.

Although the EA prepared for Western Geophysical's project contains only a brief discussion of cumulative impa the cumulative impacts of 150 miles of geophysical lines per year in its December 1988 Grand Resource Area RMP Oil & (UT-060-89-025), to which Western Geophysical's EA is tiered. BLM need not repeat that cumulative impact analysis in t See In re Grassy Overlook Timber Sale, 115 IBLA 359, 364 (1990); Oregon Natural Resources Council, supra. SUWA has f BLM did not consider cumulative impacts when assessing the environmental impact of the planned action.

We find, however, that BLM failed to adequately address the possible effects of the proposed activity on wildlife discussion in the EA concentrated solely on the project's impacts on Desert

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2/ SUWA also contends that the EA and approval decision contravene FLPMA's multiple use, inventory, and planning p improperly declined to consider alternative multiple uses of the land. Alternative uses of the land were considered in the Ju Area RMP and need not be considered anew each time BLM decides to approve a project. Southern Utah Wilderness Allianc (1992). SUWA's challenges essentially focus on BLM's purported failure to designate areas of critical environmental concer of diminishing resources such as archaeology and wilderness before BLM adopted the Grand Resource Area RMP. The B to consider challenges to BLM's land-use planning decisions. See, e.g., Southern Utah Wilderness Alliance, 122 IBLA at 17 v. BLM, 116 IBLA 55, 61 (1990). Such challenges must be pursued through a separate inter-Departmental process. See 43 C has authority to consider an appellant's challenge to the manner in which an RMP has been implemented. SUWA has not esta seismic activity violates the RMP. We also note that the project area was not formally designated by BLM as part of a wilde pursuant to section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1988), and thus is not entitled to protection as a WSA. Sc Alliance, 122 IBLA at 172 n.7.

Bighorn Sheep and proposed measures to mitigate those impacts. No other species were discussed. In a July 22, 1991, letter noted that diverse species inhabit the project area and criticized BLM's failure to discuss the project's impacts on these speci on the impacts to nesting raptors and suggesting ways to minimize possibly significant impacts to those and other bi consideration of the potential impacts of the project on wildlife must be remedied on remand. 3/

SUWA further contends that BLM's refusal to allow public comment on Western Geophysical's proposal implementing regulations. SUWA asserts that in May 1991 the Moab District Manager announced on television that BLM wo comment period on EA's prepared for any seismic proposals within the Paradox Fold Belt area involved here, and that SU providing detailed substantive comments on the proposal before the release of the EA. SUWA also specifically requested a on the EA in a letter received by BLM on May 22, 1991. BLM responds that allowance of a public comment period is determined that the concerns expressed by SUWA in that letter did not warrant the additional delay that would result from a

NEPA and its regulations do not explicitly require a Federal agency to allow public comment on every EA. 4/ S (mandating a 30-day public review period for a finding of no significant impact only if the proposed action is one which is an action which usually requires the preparation of an EIS or the nature of the proposed action has no precedent). The sta clearly envisions active public involvement in the NEPA process. The Council on Environmental Quality (CEQ) regulation agencies,
including BLM, "to the fullest extent possible * * * [e]ncourage and facilitate public involvement in decisions which affect environment." 40 CFR 1500.2(d); see also 40 CFR 1506.6.

3/ SUWA also argues that BLM failed to use high-quality scientific information. BLM admits that it was unable to quan vegetation which will be caused by the project due to the nature of the seismic method being used and the varying vegetat area involved. To compensate for the lack of precision, BLM analyzed the "worst case" situation assuming plant mortal lowered and shaken. See Aug. 21, 1991, memorandum at unnumbered page 3, #7. We find that BLM adequately considere vegetation, and reject SUWA's argument that the lack of exact data tainted BLM's decisionmaking.

4/ At least one U.S. Court of Appeals, however, has held that public participation is required in the preparation of an EA Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

The Departmental Manual section which implements the CEQ regulations provides that the various bureaus wil

> utilize procedures to insure the fullest practicable provision of timely public information and understanding of t
> programs with environmental impact including information on the environmental impacts of alternative courses of
> procedures will include, wherever appropriate, provision for public meetings or hearings in order to obtain
> interested parties.

516 DM 1.6. The Manual also provides that public notification of an EA must be provided "and, where appropriate, the p process ([40 CFR] 1506.6)." 516 DM 3.3. Because the statutory and regulatory scheme heavily favor public participation be the norm, and BLM must have a compelling reason for not providing any public comment period during the EA proc Wilderness Alliance, 122 IBLA at 14 (failure to allow public comment on second EA not fatal where public comment had EA and other earlier environmental documentation).

Under the circumstances presented here, we find that BLM should have provided a public comment period on t not deny that it announced that it would allow public comments on proposals such as this one, or that SUWA specifica comments be accepted on the EA. The short delay created by permitting public input would have been outweighed by the comments would have had on the quality of the EA. For example, if BLM had considered the concerns raised by SUWA a rendering its approval decision, the deficiencies in the EA highlighted in this decision may well have been rectified earlier, po for this appeal. At the very least, BLM may have prepared a record to support its decision avoiding the need to set its decisi e.g. Southern Utah Wilderness Alliance, 122 IBLA at 170-72. On remand, BLM shall provide a public comment period on for this project.

Finally, SUWA challenges BLM's May 13, 1991, authorization of initial geophysical line survey prior to the appr contends that the survey was not casual use as defined by 43 CFR 3150.0-5 because the survey was performed by cross-cou roads and trails. Therefore, according to SUWA, such work could not have been performed lawfully without an approved N its approval did not give Western Geophysical permission to drive off-road, although it notes that the area is open to off-r

SUWA has not provided any evidence to support its assertion that Western Geophysical drove motorized vehic and trails. Thus, it has failed to establish that Western Geophysical violated 43 CFR 3150.0-5 by performing noncas approved NOI. BLM could allow flagging prior to final approval of the NOI because flagging

constituted casual use, as defined by 43 CFR 3150.0-5(b). See Southern Utah Wilderness Alliance, 122 IBLA at 175. 5/

To the extent not specifically addressed herein, SUWA's arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 4
appealed from is set aside and the case is remanded for further action consistent with this decision.

Gail M. Frazier
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

5/ We note, however, that where BLM explicitly approves such activities, it should ensure that its approval decision clear
permissible activities.